Supreme Court, U.S.
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No. 03-____

In The
Supreme Court of the United States

THE NAVAJO NATION,

Petitioner,

vs.

KRYSTAL ENERGY COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

NAVAJO NATION
Department of Justice

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QUESTION PRESENTED

Whether sections 106(a) and 101(27) of the Bankruptcy Code expressly and unequivocally waive the sovereign immunity of an Indian Tribe?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Navajo Nation respectfully prays that this Court issue a writ of certiorari to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion and denial of rehearing en banc of the court of appeals (App., infra, 1-13), is reported at 357 F.3d 1055. The opinion of the United States District Court for the District of Arizona (App. 14-26) is reported at 308 B.R. 48. The opinion and order of the United States Bankruptcy Court for the District of Arizona (App. 27-45), are unreported.

JURISDICTION

The amended opinion and denial of rehearing en banc of the court of appeals was issued on April 6, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

Bankruptcy Code Sections 11 U.S.C. §§ 106(a) and 101(27). These relevant provisions are as follows:

> (27) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a

United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government; 11 U.S.C. § 101(27) (1995).

§ 106. Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall

be consistent with appropriate nonbankruptcy law applicable to such governmental un t and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate. 11 U.S.C. § 106 (1995).

STATEMENT OF THE CASE

Petitioner The Navajo Nation is a federally recognized Indian tribe and is the largest such tribe in the United States, comprised of more than 225,000 members and occupying over 25,000 square miles of trust lands within three states, Arizona, New Mexico and Utah. Petitioner challenges the court of appeals holding that the Navajo Nation's sovereign immunity has been abrogated under 11 U.S.C. §§ 106(a) and 101(27).

This holding conflicts with the framework established by this Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 439 (1978) and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985). Those cases recognize that a congressional abrogation of a tribal government's sovereign immunity must be unequivocally expressed in explicit legislation and must not be implied.

The Ninth Circuit's ruling is contrary to Supreme Court precedent. It also conflicts with decisions of other circuits.

I. STATEMENT OF FACTS

Krystal Energy Co. ("Krystal") is a debtor in a Chapter 11 bankruptcy proceeding. Krystal was issued tax assessments in the amount of $691,000 by the Office of the Navajo Tax Commission on December 14, 2000. App. 30. Krystal filed for Chapter 11 Bankruptcy on January 5, 2001. Krystal appealed the Office the Navajo Tax Commission Assessment on January 8, 2001. Krystal filed this adversary proceeding against the Navajo Nation on March 5, 2001.

The Navajo Nation is a federally recognized Indian Tribe with its reservation located in portions of the states of Arizona, New Mexico and Utah. The Navajo Nation is the largest Indian tribe in the nation, both in population and land area. The Navajo Nation is comprised of more than 225,000 members and occupying over 25,000 square miles of trust lands. The United States set apart a reservation for the Navajos by treaty in 1868 (15 Stat. 667), and the reservation has been repeatedly enlarged by executive

order and statute. See J. Lee Correll & Alfred Dehiya, *Anatomy of the Navajo Indian Reservation* (rev. ed. 1976).

The present Navajo government structure is in three branches: Executive, Legislative and Judicial. The Executive Branch includes the President of the Navajo Nation, the Vice President, and appointed officials overseeing 10 divisions and several offices. The Legislative Branch consists of the Speaker of the Council and the Navajo Nation Council comprised of 88 elected council delegates representing 110 chapters. The Judicial Branch includes the Chief Justice and the Navajo Nation trial and appellate courts. Elections for the President and the delegates are held every four years in November.

Despite significant mineral wealth, the reservation lacks basic infrastructure needed to support a self-sustaining economy. The Navajo Nation government relies significantly on revenues from natural resource leasing and taxation to provide basic services. The Navajo Nation Government funds a broad range of government activities, including economic development, community development, human resources, natural resources, public safety, health services, social services, education, legislative and judicial services and functions.

II. PROCEDURAL HISTORY

On January 5, 2001, Krystal filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the District of Arizona. On March 5, 2001, Krystal filed an adversary proceeding against the Navajo Nation seeking (1) a turnover of certain assets under 11 U.S.C. § 542; (2) determination of tax due to the Nation under 11 U.S.C. § 505; and

(3) damages arising out of the seizure of Krystal's assets by the Nation.

On April 6, 2001, the Nation filed a motion to dismiss the complaint on three grounds; (1) Krystal's claims for turnover of property and determination of taxes are barred by sovereign immunity; (2) the Nation has not been properly served under Rule 7004(d)(6) of the Bankruptcy Rules if it is subject to suit; and (3) Krystal has failed to join an indispensable party. The Nation made a special appearance to defend this adversary proceeding. On May 23, 2001, the bankruptcy court heard oral arguments from both plaintiff and defendant regarding the motion to dismiss filed by the defendant. On September 28, 2001, the bankruptcy court granted the Nation's motion to dismiss the complaint. App. 27-28. The bankruptcy court relied on the standards established by this Court in *Kiowa* when it dismissed. The court determined Bankruptcy Code sections 106(a) and 101(27) were not sufficient to establish an express and unequivocal waiver of sovereign immunity of an Indian tribe. App. 42.

On October 12, 2001, Krystal filed a notice of appeal from the final order of the bankruptcy court, electing to have the appeal heard by the district court, rather than the Bankruptcy Appellate Panel. The district court considered this Court's pronouncements on tribal immunity, along with statutory language that does not unequivocally abrogate tribal immunity, and determined inference to the contrary would be inappropriate. The district court recognized this Court's instruction that because of the "unique trust relationship between the United States and Indian Nations," where Indian rights are at issue, "ambiguities in federal laws must be resolved to the Indians' advantage." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766

(1985). The district court affirmed the bankruptcy court when it held although Section 106(a) holds that immunity is abrogated for "governmental units," the definition of "governmental units," pursuant to Section 101(27), does not explicitly identify Indian tribes. App. 23.

On appeal, a panel of the Ninth Circuit reversed the decision of the district court in an opinion dated February 10, 2004. Writing for the panel, Judge Berzon determined these statutes, which do not include the term "Indian tribes" or any similar language, suffice to abrogate Indian tribes' immunity from suit. App. 4. The court determined it is clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of all "foreign and domestic governments." Section 106(a) explicitly abrogates the sovereign immunity of all "governmental units." So the category "Indian tribes" is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate. App. 5. The appeals court stated "Congress explicitly abrogated the immunity of any "foreign or domestic government." Indian tribes are domestic governments. Therefore, Congress expressly intended to abrogate the immunity of Indian tribes. App. 5.

The Navajo Nation filed a timely petition for rehearing en banc. In an amended opinion and order dated April 6, 2004, the petition for rehearing was denied. App. 1.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this case contravenes the principles firmly established by this Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,

523 U.S. 751 (1998), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 439 (1978), governing a determination as to whether the sovereign immunity of an Indian tribal government has been abrogated. The opinion misapprehends the law set forth in the cases *Kiowa* and *Santa Clara* regarding the requirements of congressional abrogation of the sovereign immunity of a tribal government. The ruling determines that Congress did intend to abrogate the sovereign immunity of Indian tribes even though the term "Indian tribes" or any similar language is not included the Bankruptcy Code. The ruling is in conflict with the requirement that a congressional abrogation of a tribal government's sovereign immunity must be unequivocally expressed in explicit legislation and must not be implied. The Panel reached its decision notwithstanding a history of federal deference to the interest of Indian tribes; when ambiguous, a statute should be construed for the benefit of Indians. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

The Ninth Circuit's approach to abrogation of the sovereign immunity of a tribal government is in conflict with that taken by the Tenth Circuit, *see In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003), and gives rise to a result squarely inconsistent with decisions in that Circuit. The *Mayes* Court determined that sovereign immunity was not abrogated by Congress in looking at the identical Bankruptcy Code sections.

The question of whether the sovereign immunity of a tribal government has been waived by the Bankruptcy Code is an important one. This decision will dramatically impact hundreds of federally recognized tribal governments. This decision opens the floodgate to all types of actions that could be brought against tribal governments

in bankruptcy court forums. The abrogation of tribal sovereign immunity gravely threatens Congress' "goals of tribal self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *KIOWA* AND *SANTA CLARA*

The court of appeals' decision disregards this Court's fully articulated standard with respect to the abrogation of the sovereign immunity of an Indian tribal government. In its place, the lower court inferred that Congress must have meant to waive the sovereign immunity of an Indian tribe without any specific mention of Indian tribes in the Bankruptcy Code. App. 4.

A. The Court of Appeals Erroneously Ignored the Well Settled Doctrine That A Waiver of Sovereign Immunity Cannot Be Implied But Must Be Unequivocally Expressed Established by This Court's Decisions

The Ninth Circuit Panel in reversing the Bankruptcy Court and the Federal District Court determined that Congress waived the sovereign immunity of an Indian tribal government under the U.S. Bankruptcy Code. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004); App. 1-13. The Panel concluded that Congress intended to include tribal governments under the term "domestic government" as used in 11 U.S.C. § 101(27). App. 6. The Panel came to this conclusion despite the recognition that

no definition of the Bankruptcy Code actually lists "Indian Tribes" as either a foreign or domestic government. App. 4.

The panel determined that it is clear from the face of §§ 106(a) and 101(27) of the Bankruptcy Code that Congress did intend to abrogate the sovereign immunity of all "foreign and domestic governments." In reaching this conclusion, the panel determined the term "governmental unit" in Section 101(27) includes Indian tribes. App. 5-6. Section 101 (27) defines "governmental unit" as follows:

> (27) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

11 U.S.C. § 101(27). The panel's determination conflicts with the well settled doctrine that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-9 (1978) citing *United States v. Testan*, 424 U.S. 392, 399 (1976). In the absence here of any unequivocal expression of contrary legislative intent, suits against the Navajo Nation are barred by its sovereign immunity from suit. *Santa Clara Pueblo*, at 59. Bankruptcy Code Sections 106(a) and 101(27) simply do not refer to tribes nor is there any reference in the legislative history. The intent of Section 106 was to waive the sovereign immunity of the States and the Federal Government. H.R. Rep. 103-335 at 42. Indian tribes are not mentioned anywhere in the Bankruptcy Code.

Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512-513 (1940). "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit.'" *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo*, 436 U.S. at 59; *In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003). Abrogation by Congress of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo*, 436 U.S. at 59.

B. Congress Has Not Abrogated The Sovereign Immunity of Tribes in the Bankruptcy Courts

Congress was delegated the authority to "regulate Commerce with foreign Nations . . . and with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Congress has exercised this authority by statute. "Congress knows how to limit the sovereign immunity of others when it wants to." *In Re Greene*, 980 F.2d 590, 594 n. 3 (9th Cir. 1992), cert. denied sub nom. *Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994). In the Foreign Sovereign Immunity Act of 1976 ("FSIA"), Congress exempted commercial activities of foreign states having a direct effect in the United States from the general conferral of immunity from state court process. *See* 28 U.S.C. § 1605. Congress has also abrogated tribal sovereign immunity in rare instances. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. at 71 (Congress provided federal court review only in habeas corpus

proceedings under the Indian Civil Rights Act). "But, for obvious reasons, this power has been sparingly exercised." *Thebo v. Choctaw Tribe*, 66 F. at 375 (CCA 8 1895).

Indeed, at about the same time as it passed the FSIA, Congress preserved fully the tribes' sovereign immunity from suit. In effectuating President Nixon's "self-determination without termination" policy,[1] Congress passed the Indian Self-Determination and Education Assistance Act of 1975, which provided that "[n]othing in this Act shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity enjoyed by an Indian tribe . . . . " 25 U.S.C. § 450(n)(1).[2]

Congress has not seen fit to abrogate tribal sovereign immunity in the Bankruptcy courts. It clearly has the power to do so. "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 60. This requirement of a clear statement from Congress honors the allocation of federal

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[1] Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564, 565.

[2] The Indian Self-Determination and Education Assistance Act is but one of several recent statutes declaring Congress' commitment to Indian self-sufficiency and self-determination. 25 U.S.C. § 450a(b). See Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601(2) ("the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government"); Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency and strong tribal government").

power in Article I, § 8 of the Constitution, with lasting structural and practical benefits. See Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 428 (1993).

Courts have recognized that Congress knows how to limit the sovereign immunity of others when it wants to. *In Re Greene*, 980 F.2d 590, 594 n. 3 (9th Cir. 1992), cert. denied sub nom. *Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994). In *Greene*, the court considered whether a Chapter 7 trustee could sue an Indian tribe to avoid a preferential transfer. It asked the question whether the Bankruptcy Code shows an intent to subject the tribe to bankruptcy court jurisdiction. *Id.* at 597. The Greene court dismissed the adversary proceeding, concluding that the bankruptcy court's jurisdiction over property of the estate and adversary proceedings does not act to pierce the tribe's immunity from suit. *Id.* at 598. Since only Congress can limit the scope of tribal immunity and has not done so, the tribes retain the immunity sovereigns enjoy at common law. *Id.* at 594.

The Panel recognized there is no specific reference in the Bankruptcy Code to Indian tribes. App. 4-5. Courts have found abrogation of tribal sovereign immunity in cases where Congress has specifically included "Indian tribes" in definitions of parties who may be sued under specific statutes. *See Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (finding congressional intent to abrogate Tribe's sovereign immunity with respect to violations of the Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901 et seq. "Person" is subsequently defined to include municipalities. 42 U.S.C. § 6903(15). Municipalities are defined to include

"an Indian tribe or authorized tribal organization . . . " 42 U.S.C. § 6903(13)(A)); *Osage Tribal Council v. United States Dep't of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999) (same re Safe Drinking Water Act, the definitional sections of the SDWA define the term "person" to include a "municipality." 42 U.S.C. § 300f(12). In turn, "municipality" is defined to include "an Indian tribe." 42 U.S.C. § 300f(10).) "Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the *Santa Clara* requirement than that Congress unequivocally state its intent." *Osage Tribal Council*, 187 F.3d at 1182. In this case, there is simply no mention of Indian tribes in the Bankruptcy Code sections relied upon by the panel.

In cases where the language of a federal statute does not include "Indian tribes" in the definitions of parties subject to suit or does not specifically assert jurisdiction over "Indian tribes", courts have found the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity. *In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003); *In re National Cattle Congress*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000); *See Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-58 (2d Cir. 2000) (holding Indian tribe immune from suit under the Copyright Act); *Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe*, 166 F.3d 1126, 1131 (11th Cir. 1999) (stating that because Congress made no specific reference to Tribes anywhere in the Americans With Disabilities Act ("ADA"), tribal immunity is not abrogated; suit under ADA dismissed).

A Ninth Circuit case found an affirmative waiver of immunity by a tribe only through its active participation as a creditor in a bankruptcy. That waiver carried forward

to a chapter 7 proceeding after the case converted from chapter 11. *Confederated Tribes of the Colville Reservation Tribal Credit v. White (In re White)*, 139 F.3d 1268, 1269 (9th Cir. 1998). In *White*, the Colville Tribal Credit filed an objection to a chapter 11 plan, arguing the plan had not been filed in good faith. The tribe also filed a ballot rejecting the plan. Once the plan was amended, the tribe filed another rejection ballot. *Id.* at 1270. In *White*, the court recognized that Indian tribes may consent to suit without explicit Congressional authority. *In re White*, at 1271 citing to *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). Such waiver may not be implied, but must be expressed unequivocally. *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). Initiation of a lawsuit is an action that "necessarily establishes consent to the court's adjudication of the merits of that particular controversy," including the risk of being bound by an adverse determination. *In re White*, at 1271. The only Navajo Nation participation, in Krystal Energy's bankruptcy, was the filing of a motion to dismiss the adversary complaint filed by Krystal Energy. The Navajo Nation did not file a nor did it participate in any other manner in Krystal Energy's bankruptcy. App. 32.

Neither Congress nor the Navajo Nation has unequivocally waived the Navajo Nation's sovereign immunity in this case. "Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear, and . . . ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). A Congressional abrogation of tribal immunity cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58.

CONCLUSION

The issue raised here clearly warrants Supreme Court review. The proceeding involves a question of exceptional importance including the proper rule to apply to questions of a tribal government's sovereign immunity in the bankruptcy courts. The Ninth Circuit's approach to abrogation of the sovereign immunity of a tribal government is in conflict with that taken by the Tenth Circuit. *In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003). This decision opens the floodgate to all types of actions that could be brought against tribal governments in bankruptcy court forums. The abrogation of tribal sovereign immunity gravely threatens Congress' "goals of tribal self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted this 2nd day of July, 2004.

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357 F.3d 1055

United States Court of Appeals,
Ninth Circuit.

KRYSTAL ENERGY COMPANY, Plaintiff-Appellant,
v.
NAVAJO NATION, Defendant-Appellee.

No. 02-17047.

Argued and Submitted Dec. 1, 2003.
Filed Feb. 10, 2004.
As Amended on Denial of
Rehearing En Banc April 6, 2004.*

J. Kent MacKinlay, Warnock, MacKinlay & Associates, Mesa, Arizona, for the plaintiff-appellant.

Marcelino R. Gomez, Navajo Nation Department of Justice, Window Rock, Navajo Nation (Arizona), for the defendant-appellee.

Appeal from the United States District Court for the District of Arizona; Mary H. Murguia, District Judge, Presiding. D.C. No. CV-01-01970-MHM.

Before LEAVY, PAEZ, and BERZON, Circuit Judges.

BERZON, Circuit Judge:

Appellant **Krystal Energy** Company ("Krystal") appeals the district court's dismissal of its adversary action under the Bankruptcy Code, 11 U.S.C. §§ 505 and 542, against the Navajo Nation, an Indian tribe. The district court based its dismissal on the Navajo Nation's

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* Judges Paez and Berzon vote to deny the petition for rehearing en banc. Judge Leavy recommends denial of the petition for rehearing en banc.

sovereign immunity to suit in the absence of explicit abrogation of that immunity by Congress. Whether Congress has abrogated the sovereign immunity of Indian tribes by statute is a question of statutory interpretation and is reviewed de novo. *Demontiney v. United States,* 255 F.3d 801, 805 (9th Cir.2001). Because we conclude that Congress did abrogate the sovereign immunity of Indian tribes under 11 U.S.C. §§ 106(a) and 101(27), we reverse.[1]

Immunity from suit has been recognized by the courts of this country as integral to the sovereignty and self-governance of Indian tribes. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 756-58, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) ("*Kiowa Tribe*"). *See also Okla. Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) ("*Potawatomi*") (recognizing the sovereign immunity of Indian tribes absent a clear waiver by the tribe or congressional abrogation); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). Tribal sovereign immunity is not absolute, however. Congress

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[1] The Navajo Nation does not argue that, even had Congress abrogated Indian tribal sovereign immunity, such abrogation would be unconstitutional. In fact, the Navajo Nation states in its brief to this Court that Congress "clearly" had power "to abrogate tribal sovereign immunity in the Bankruptcy courts."

may abrogate it and thereby authorize suit against Indian tribes. *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670 (citing *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)). Such an abrogation must be "unequivocally expressed," *id.,* in "explicit legislation," *Kiowa Tribe,* 523 U.S. at 759, 118 S.Ct. 1700. Abrogation of tribal sovereign immunity may not be implied. *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670 (citing *Testan,* 424 U.S. at 399, 96 S.Ct. 948).

Identical language is used by courts in determining whether Congress has abrogated the sovereign immunity of states. *Seminole Tribe of Fla. v. Fla.,* 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) ("In order to determine whether Congress has abrogated the States' sovereign immunity, we ask [,] . . . first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity'" (citations omitted)); *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (same); *see also Osage Tribal Council v. United States Dep't of Labor,* 187 F.3d 1174, 1181 (10th Cir.1999) ("Conceding potential differences between tribal and state sovereign immunity, we note that courts have often used similar language in defining the requirements for waiver of [Eleventh Amendment state sovereign immunity]."); *Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians,* 166 F.3d 1126, 1131 (11th Cir.1999) (equating the standards applied in determining whether Congress abrogated "federal and state governments' protection from suit" and tribal sovereign immunity). While there are additional constraints on Congress's power to abrogate state sovereign immunity, we may look to state sovereign immunity precedent to help determine how "explicit" an abrogation must be, and do so in deciding the issue before us.

That issue is whether Congress abrogated the sovereign immunity of Indian tribes when it enacted § 106 of the Bankruptcy Code. To answer this question, we look to the text of the code:[2]

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections . . . 505, . . . 542. . . .

11 U.S.C. § 106(a) (1995).

"Governmental unit," in turn, is defined as:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic governments. . . .

11 U.S.C. § 101(27) (1995). Neither the Supreme Court nor any circuit has determined whether these statutes, which do not include the term "Indian tribes" or any similar

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[2] *In re Mitchell,* 209 F.3d 1111 (9th Cir.2000), invalidated § 106 insofar as it attempts to abrogate the sovereign immunity of States. *Id.* at 1118-20 (holding that, (1) if enacted pursuant to the Bankruptcy Clause of Article I, § 106 is unconstitutional pursuant to *Seminole Tribe;* and, (2) if passed to enforce "a protection afforded by the Fourteenth Amendment," then "[u]ntil Congress makes findings of a pattern of state violations and passes legislation that is proportional to its remedial aims, § 106(a) must be viewed as an unconstitutional assertion of Congress's power" under the "congruent and proportional" test of *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)). No question has been raised in this case concerning the constitutionality of § 106 as it applies to Indian tribes.

language, suffice to abrogate Indian tribes' immunity from suit.[3]

It is clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of *all* "foreign and domestic governments." Section 106(a) explicitly abrogates the sovereign immunity of all "governmental units." The definition of "governmental unit" first lists a sub-set of all governmental bodies, but then adds a catch-all phrase, "or other foreign or domestic governments." 11 U.S.C. § 101(27). Thus, *all* foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered "governmental units" for the purpose of the Bankruptcy Code, and, under § 106(a), are subject to suit.

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[3] In two earlier opinions, we noted but did not decide the issue befure us in this case. In *Richardson v. Mt. Adams Furniture (In re Greene)*, 980 F.2d 590, 597-98 (9th Cir.1992), we construed an earlier version of § 106 that did not expressly abrogate sovereign immunity for any governmental unit in the circumstances pertinent in that case and in this one. Assuming "without deciding" that Indian tribes are "governmental units" for the purposes of § 101(24) and § 106, we held that just as § 106 as it then existed was not sufficiently explicit to waive the sovereign immunity of states and the federal government with regard to money judgments, so that section did not abrogate the sovereign immunity of Indian tribes with regard to such judgments. *In re Greene*, 980 F.2d at 597-98. As the court in *In re Greene* was not applying the present language of § 106, expressly abrogating sovereign immunity for specified sections of the bankruptcy code of all "governmental unit[s]," and only assumed, but did not decide, whether Indian tribes are "governmental units" under § 101(24), *In re Greene* does not aid us in deciding the issue before us today. *See also Confederated Tribes of the Colville Reservation Tribal Credit v. White (In re White)*, 139 F.3d 1268, 1270 n. 1 (9th Cir.1998) ("White did not appeal the district court's alternative holding that § 106 of the Bankruptcy Code did not abrogate tribal immunity. Therefore, that issue is not before us and we express no view on whether an Indian Tribe is a 'governmental unit' for purposes of § 106(a) or (b).").

Indian tribes are certainly governments, whether considered foreign or domestic (and, logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states).

The Supreme Court has recognized that Indian tribes are "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Potawatomi,* 498 U.S. at 509, 111 S.Ct. 905 (citing *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, 8 L.Ed. 25 (1831)); *see also, Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (comparing Indian tribes to states and foreign sovereigns, and concluding that both states and Indian tribes are "domestic" sovereigns). So the category "Indian tribes" is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate.

Had Congress simply stated, "sovereign immunity is abrogated as to all parties who otherwise could claim sovereign immunity," there can be no doubt that Indian tribes, as parties who could otherwise claim sovereign immunity, would no longer be able to do so. Similarly here, Congress explicitly abrogated the immunity of *any* "foreign or domestic government." Indian tribes are domestic governments. Therefore, Congress expressly abrogated the immunity of Indian tribes. *See In re Russell,* 293 B.R. 34, 44 (D.Ariz.2003) (concluding that § 106(a) abrogates tribal sovereign immunity "unequivocally[] and without implication"); *see also In re Davis Chevrolet, Inc.,* 282 B.R. 674, 683 n. 5 (Bankr.D.Ariz. 2002) ("It seems to this court that 'other domestic government' is broad enough to encompass Indian tribes."); *In re Mayes,* 294 B.R. 145, 157-60 (10th Cir.2003) (McFeeley, J., dissenting) (arguing that § 106(a)

does abrogate tribal sovereign immunity); *In re Vianese,* 195 B.R. 572, 575 (Bankr.N.D.N.Y. 1995) (holding that Tribe had individually waived its sovereign immunity, and stating in dicta that § 106(a) did abrogate the sovereign immunity of Indian tribes under the Bankruptcy Code).

Similar syllogistic reasoning was followed in *Kimel,* a case concerning the abrogation of state sovereign immunity. *Kimel,* 528 U.S. at 73-74, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). In that case, the Supreme Court held that Congress had clearly expressed its intent to abrogate the sovereign immunity of the states when passing certain amendments to the Age Discrimination Enforcement Act (ADEA). *Id.* At the same time, *Kimel* recognized that this expression of intent, while explicit, did not appear in terms on the face of the ADEA:

> The ADEA states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in section[] . . . 216 . . . of this title. . . ." 29 U.S.C. § 626(b). Section 216(b), in turn, clearly provides for suits by individuals against States. That provision authorizes employees to maintain actions for backpay "against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . ." Any doubt concerning the identity of the "public agency" defendant named in § 216(b) is dispelled by looking to § 203(x), which defines the term to include "the government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State." Read as a whole the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

Id. Congress, therefore, need not make its intent to abrogate "unmistakably clear" in a single section of a statute. *Id.* at 76, 120 S.Ct. 631. *See also Osage Tribal Council v. United States Dep't of Labor,* 187 F.3d 1174, 1181-82 (10th Cir.1999) (holding that the Safe Drinking Water Act "contains a clear and explicit waiver of tribal immunity" despite the fact that the court had to piece together various subsections of the statute to arrive at that conclusion).

The difference between *Kimel* and *Osage,* on the one hand, and the case presently before us, on the other, is evident but, in the end, unimportant: Unlike the definition of "public agency" in the ADEA, which *does* list "States,"[4] no definition in the Bankruptcy Code actually lists "Indian tribes" as either a foreign or domestic government. However, in enacting the Bankruptcy code, Congress was legislating against the back-drop of prior Supreme Court decisions, which *do* define Indian tribes as domestic nations, i.e., governments, as well as against the ordinary, all-encompassing meaning of the term "other foreign or domestic governments."

In the realm of Eleventh Amendment abrogation, Congress clearly does not have to list all of the specific states, beginning with Alabama and ending with Wyoming, for a court to conclude in one specific instance that Wisconsin's sovereign immunity has been abrogated by a statute that abrogates the sovereign immunity of all states. Similarly, Congress has abrogated the sovereign immunity of all foreign and domestic governments in § 106(a) of the Bankruptcy Code. The Navajo Nation is a

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[4] Similarly, as discussed in *Osage,* the definition of "municipality" in the SDWA lists "Indian tribe." *Osage,* 187 F.3d at 1182.

specific example of a domestic government. Therefore, the Navajo Nation's sovereign immunity, like that of all individual domestic governments, has been abrogated.

We can find no other statute in which Congress effected a generic abrogation of sovereign immunity and because of which a court was faced with the question of whether such generic abrogation in turn effected specific abrogation of the immunity of a member of the general class. In *Bassett v. Mashantucket Pequot Tribe,* 204 F.3d 343 (2d Cir.2000), and *Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.,* 166 F.3d 1126 (11th Cir.1999), our sister circuits held that Congress had not expressly abrogated Tribal sovereign immunity in either the Copyright Act or the ADA. However, the sections of those statutes purporting to abrogate *states'* sovereign immunity do not also purport to abrogate the sovereign immunity of "other foreign or domestic governments," or some similarly generic term. *See* 17 U.S.C. § 511 (1999) ("Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by section 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title."); 42 U.S.C. § 12188 (1995) (providing a general cause of action for "any person who is being subjected to discrimination on the basis of disability in violation of this subchapter"); *see also,* 42 U.S.C. § 12202 (1995) ("A State shall not be immune under the eleventh amendment to the

Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." (footnote omitted)).[5] We cannot, thus, rely on these cases for guidance under the Bankruptcy Code.

It is clear from the text of § 106(a) that Congress intended to abrogate the sovereign immunity of both the states and another group of those who may assert sovereign immunity, other foreign and domestic governments. The statute explicitly uses the terms "sovereign immunity" and "abrogate." This manifest intent distinguishes the present case from those Eleventh Amendment cases in which courts had to determine whether the provision of a general, federal cause of action abrogated states' sovereign immunity.

In *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 245-46, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), for example, the court held that Congress had not unequivocally expressed its intent to abrogate the sovereign immunity of the states in the Rehabilitation Act. That statute simply authorized suit in federal court against any recipient of federal funds – a category that certainly included individuals other than states or parties capable of claiming sovereign immunity. *Id.* ("The Statute thus provides remedies for violations of [the Rehabilitation Act] by '*any*' recipient of Federal assistance." There is no claim here

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[5] The Supreme Court has accepted a petition for certiorari in a case concerning the constitutionality of Congress's attempt to abrogate the rights of states in Title II of the ADA. *Lane v. Tennessee,* 315 F.3d 680 (6th Cir.2003), *cert. granted Tennessee v. Lane,* ___ U.S. ___, 123 S.Ct. 2622, 156 L.Ed.2d 626 (2003). The issue in *Lane,* however, is whether or not Congress abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment, not whether the abrogation was explicit enough.

that the State of California is not a recipient of federal aid. *"A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."* (second emphasis added)). *See also Davidson v. Bd. of Governors of State Colls. & Univs. for W. Ill. Univ.*, 920 F.2d 441, 443 (7th Cir.1990) (holding that Congress need not have "said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases" to effectively abrogate states' immunity, but distinguishing those cases where Congress had simply provided a general cause of action as "insufficiently unequivocal a designation of the state to override its sovereign immunity").

Section 106(a) does not simply "authorize suit in federal court" under the Bankruptcy Code – it specifically abrogates the sovereign immunity of governmental units, a defined class that is largely made up of parties that could claim sovereign immunity. So to recognize is not, as the Navajo Nation suggests, to *imply* an abrogation that is not explicit in the statute. Instead, reading § 106(a)'s express abrogation as reaching Indian tribes simply interprets the statute's reach in accord with both the common meaning of its language and the use of similar language by the Supreme Court. No implication beyond the words of the statute is necessary to conclude that Congress "unequivocally expressed" its intent to abrogate Indian tribes' immunity.

Finally, we also note that, were Indian tribes not "governmental units" for the purpose of § 106(a), a tribe that voluntarily proceeded in federal court under the Code would not be a "governmental unit" under the other sections of the Bankruptcy Code, either. The sections applicable to "governmental units" are myriad, and

include § 523 – Exceptions to discharge – which states: "A discharge under[certain sections] of this title does not discharge an individual debtor from any debt . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than [certain] tax penalt[ies]." 11 U.S.C. § 523. Thus, although Indian tribes' sovereign immunity is abrogated by § 106(a), Congress has also provided certain special treatment to Indian tribes as governmental units within the Bankruptcy Code.

We are well aware of the Supreme Court's admonitions to "tread lightly" in the area of abrogation of tribal sovereign immunity. *See, e.g., Santa Clara Pueblo,* 436 U.S. at 72, 98 S.Ct. 1670 ("Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly strained."); *see also id.* at 60, 98 S.Ct. 1670 ("Although Congress clearly has power to authorize civil actions against tribal officers, . . . a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."); *Kiowa Tribe,* 523 U.S. at 759, 118 S.Ct. 1700 ("The capacity of the Legislative Branch to address the issue [of tribal sovereign immunity] by comprehensive legislation counsels some caution by us in this area."). But the Supreme Court's decisions do not require Congress to utter the magic words "Indian tribes" when abrogating tribal sovereign immunity. Congress speaks "unequivocally" when it abrogates the sovereign immunity of "foreign and domestic governments." Because Indian tribes

are domestic governments, Congress has abrogated their sovereign immunity in 11 U.S.C. § 106(a).

REVERSED and REMANDED.

308 B.R. 48

United States District Court,
D. Arizona.

In re **KRYSTAL ENERGY** CO., INC., Debtor.
Krystal Energy Co., Inc., Plaintiff/Appellant
v.
The Navajo Nation, Defendant/Appellee.

No. CIV-01-1970-PHX MHM.
Bankruptcy No. B 01-00166 ECF SSC.
Adversary No. 01-171.

Sept. 30, 2002.

J. Kent MacKinlay, Esq., Warnock MacKinlay & Associates PLLC, Mesa, AZ, for appellant.

Marcelino Rodolfo Gomez, Esq., Navajo Nation Department of Justice, Window Rock, AZ, for appellee.

ORDER AFFIRMING THE BANKRUPTCY COURT'S RULING

MURGUIA, District Judge.

This matter comes before the Court on an appeal by **Krystal Energy** Co., Inc. ("Krystal" or "Plaintiff") of a ruling by the U.S. Bankruptcy Court for the District of Arizona, granting the motion to dismiss in favor of the Navajo Nation ("the Nation" or "Defendant") against Krystal.

I. INTRODUCTION

Krystal claims the bankruptcy court erred as matter of law in granting the Nations' motion to dismiss. Krystal contends the Nations' sovereign immunity is abrogated

under the revised 11 U.S.C. § 106(a), for purposes of subjecting the Nation to suit in actions under the Bankruptcy Code sections 505 and 542. The Nation counters that the definition of "governmental unit," as referred to in Section 106(a), does not specifically apply to Indian Tribes. The Nation further contends it has not waived its sovereign immunity either by filing of a proof of claim or formally entering into Krystals' bankruptcy proceeding. However, the Nation contends if it is subject to suit, Krystal failed to properly serve the complaint according to Bankruptcy Rule 7004(d)(6) and failed to join an indispensable party. For the following reasons, this Court affirms the judgment of the bankruptcy court and holds that Section 106(a) does not abrogate the Nation's sovereign immunity.

II. BACKGROUND

On January 5, 2001, Krystal filed a Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the District of Arizona. On March 5, 2001, Krystal filed an adversary proceeding against the Nation seeking (1) a turnover of certain assets under 11 U.S.C. § 542; (2) determination of tax due to the Nation under 11 U.S.C. § 505; and (3) damages arising out of the seizure of Krystal's assets by the Nation. For purposes of this appeal, the Court will not address Krystals' third count, as Krystal conceded the Nation does possess sovereign immunity regarding claims for damages. *Appellants' Br. at 2.*

On April 6, 2001, the Nation filed a motion to dismiss the complaint on three grounds; (1) Krystal's claims for turnover of property and determination of taxes are barred by sovereign immunity; (2) the Nation has not been

properly served under Rule 7004 of the Bankruptcy Rules if it is subject to suit; and (3) Krystal has failed to join an indispensable party. *Appellees' Br. at 2.* The Nation made a special appearance to defend this adversary proceeding. On May 23, 2001, the bankruptcy court heard oral arguments from both plaintiff and defendant regarding the motion to dismiss filed by the defendant. On September 28, 2001, the bankruptcy court granted the Nation's motion to dismiss the complaint against Krystal. On October 12, 2001, Krystal filed a notice of appeal from the final order of the bankruptcy court, electing to have the appeal heard by this court, rather than the Bankruptcy Appellate Panel. *Appellants' Br. at 2.*

III. ANALYSIS

A. Standard of Review

This District Court has jurisdiction over appeals of bankruptcy courts final judgments, orders, or decrees pursuant to 28 U.S.C. § 158(a)(1). On appeal from a bankruptcy court, a district court may affirm, modify, or reverse a bankruptcy court's judgment, or remand with instructions for further proceedings. F.R.B.P. 8013. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, F.R.B.P. 8013. Under "clear error" standard for reviewing judgments, a reviewing court will not reverse simply because it would have decided differently; rather, the reviewing court must decide whether, on the entire evidence it has a definite and firm conviction that a mistake has been committed. *Easley v. Cromartie,* 532 U.S. 234, 243, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001); *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The District Court reviews bankruptcy

court's factual findings under a clearly erroneous standard. *Banks v. Gill Distribution Centers, Inc.*, 263 F.3d 862 (9th Cir.2001); *In re Bloom*, 875 F.2d 224, 227 (9th Cir.1989).

Here, the bankruptcy court's decision is a final judgment, as Krystal did not seek or obtain leave from the bankruptcy court to appeal. A final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute judgment. *In re Bonham*, 229 F.3d 750, 761 (9th Cir.2000). A court should review on appeal questions concerning the application of the controlling law *de novo*. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

B. Sovereign Immunity

The first issue presented in this case is whether the bankruptcy court erred in determining 11 U.S.C. § 106(a) did not abrogate the Nation's sovereign immunity. Plaintiff argues Congress abrogated Appellee's sovereign immunity pursuant to the 1994 revised 11 U.S.C. § 106(a). Section 106(a)(1) reads in pertinent part:

> "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to *governmental unit* to the extent set forth in this section with respect to the following: (1) . . . 505 . . . 542 . . . " [Emphasis added]

Historically, the doctrine of sovereign immunity has been applied in bankruptcy cases to protect state and federal governments from claims asserted against them by creditors and debtors. Congress included Section 106 in the Bankruptcy Code of 1978 to abrogate sovereign immunity in certain instances to establish limitations upon the

waiver of sovereign immunity. *Colliers on Bankruptcy* (15th Ed.) at 106-5. Congress, through the Bankruptcy Act of 1994, revised Section 106 in order to clarify Congress's intent to abrogate sovereign immunities of governmental units. *Id.* The amendment was intended to overrule two Supreme Court decisions; *Hoffman v. Connecticut Department of Income and Maintenance*[1] and *United States v. Nordic Village, Inc.*[2], which held that "sovereign immunity of the states and federal government was not waived by the enactment of former Section 106(c)." *Id.* As a result, amended Section 106(a)(1) lists the sections of Title 11, which abrogates Sovereign immunity, allowing the application of those provisions of the Code to governmental units.

The question now rests on whether Indian tribes are categorized as a "governmental unit." Section 101(27) of the Code defines "governmental unit" as follows:

> "United States; States; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; *or other foreign or domestic government.*" [Emphasis added]

Based on the above definition of "governmental unit," there is no clear mention of Indian tribes as a

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[1] 492 U.S. 96, 109 S.Ct. 2818, 106 L.Ed.2d 76, 20 C.B.C.2d 1204 (1989).

[2] 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181, 26 C.B.C.2d 9 (1992).

governmental unit. Krystal argues the clause "foreign or domestic government" is inclusive of Indian tribes; the Nation argues otherwise. The question still remains, do Indian tribes enjoy total sovereign immunity from bankruptcy suits absent clear statutory language? If found that Indian tribes are not governmental units, the case is affirmed; if found they are governmental units, the case will be remanded for further proceedings. Absent clear statutory guidance, this Court reviewed the following cases in its decision.

The Supreme Court clearly held that as a matter of federal law, Indian tribes are subject to suit only where Congress has authorized the suit or the tribe has waived its sovereign immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,* 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering,* 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation); *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (Suits against tribes are barred by sovereign immunity absent clear waiver by tribe or congressional abrogation); *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (Since holding Congress exceeded its authority, the abrogation of sovereign immunity under Section 106 could present constitutional issues with the Eleventh Amendment). The Ninth Circuit Court of Appeals held that a waiver of sovereign immunity for Indian tribes "cannot be implied but must be unequivocally

expressed." *In re Greene,* 980 F.2d 590 (9th Cir.1992). Guidance came from the Bankruptcy Court from the Northern District of Iowa, which held that "Congress has not unequivocally abrogated Indian tribes' sovereign immunity from suit under the Bankruptcy Code," due to the fact "Indian tribes are not specifically included in the Section 101(27) definition of 'governmental unit.'" *In re National Cattle Congress,* 247 B.R. 259, 267 (Bankr.N.D. Iowa 2000).

In *Kiowa* the Supreme Court held that Indian Nations enjoy immunity from judicial attack absent consent to be sued. *Kiowa,* 523 U.S. at 757, 118 S.Ct. 1700. The Payee in *Kiowa* brought suit against the tribe to recover a promissory note executed by the Indian tribe. The tribe moved to dismiss for lack of jurisdiction, relying in part on sovereign immunity. While the Supreme Court has taken the lead in drawing the bounds of tribal immunity, the Court held that Congress, subject to constitutional limits, has the exclusive authority to alter its limits through *explicit legislation.* [Emphasis added] *Id.* at 759, 118 S.Ct. 1700; *See also, Santa Clara Pueblo, supra,* at 58, 98 S.Ct. 1670. The Court analyzed the conflict of Indian tribes and the Bankruptcy Code through a theory of tribal immunity, determining Congress refrained from abrogating sovereign immunity in order to "promote economic development and tribal self-sufficiency." *Id.* Although the Court acknowledged this rationale could be challenged because modern tribal transactions extend beyond traditional tribal boundaries, the Court confirmed that Congress is the only one who can alter sovereign immunity through explicit legislation. *Id.* The Court believed tribal immunity is a matter of federal law, not of judicial decision-making. *Id.* Congress "has occasionally authorized limited classes of

suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it," however, Congress has not done so here. *Id.* Accordingly, the *Kiowa* court held that Indian tribe's are subject to suit only where Congress has authorized the suit. *Id.*

The Ninth Circuit Court of Appeals in *Greene* held that sovereign immunity for Indian tribes "cannot be implied but must be unequivocally expressed." 980 F.2d at 592. In *Greene,* the court considered whether the Chapter 7 trustee can sue an Indian tribe to avoid a preferential treatment. Although the bankruptcy court and district court rejected Defendant's claim of sovereign immunity, the Court of Appeals reversed and remanded with instructions to dismiss the adversary proceeding. *Id.* at 598. The Court determined that Congress considered the restrictive view of sovereign immunity when it adopted the Foreign Immunities Act of 1976. *Id.* at 594. Congress' adoption of the Act "implied at least two things: (1) It takes an act of Congress to effectively limit the sovereign immunity of a foreign sovereign; and (2) Congress knows how to limit the sovereign immunity of others when it wants to." *Id.* "The background of nearly two hundred years of recognizing sovereign immunity's extra-territorial reach, and the repeatedly recognized necessity of specific congressional action to limit tribal sovereign immunity, congressional silence on the issue of Indian tribal immunity is a compelling, if not controlling factor." *Id.* A bankruptcy court's jurisdiction over property of the estate under 28 U.S.C. § 1334 and its jurisdiction to hear adversary proceedings does not pierce an Indian tribe's immunity from suit. *Id.* at 590. Accordingly, the *Greene* court held that Congress can only limit the scope of tribal immunity, and because Congress has not done so, "[Indian] tribes retain the

immunity sovereigns enjoyed at common law, including its extra-territorial component." *Id.* at 594.

The Northern District of Iowa held that "[w]here the language of a federal statute does not include 'Indian tribes' in definitions of parties subject to suit or does not specifically assert jurisdiction over 'Indian tribes', courts find statutes insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity." *In re Cattle Congress,* 247 B.R. at 267. In *In re Nat'l Cattle,* the Debtor attempted to extinguish a real estate mortgage lien through the Chapter 11 Plan. The Tribe argued sovereign immunity protected the Indian tribe the exercise of jurisdiction by the bankruptcy court. *Id.* at 264. Although the Court held that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary," the Court clarified and said "although Indian tribes may be subject to federal law, they continue to enjoy immunity from suits." *Id.* "Abrogation by Congress of sovereign immunity cannot be implied but must be unequivocally expressed." *Id.* The Court reasoned by using instances where Congress explicitly included "Indian tribes" in definitions of parties who may be sued. *Id.* (*citing, Blue Legs v. U.S. Bureau of Indian Affairs,* 867 F.2d 1094, 1097 (8th Cir.1989)) (finding congressional intent to abrogate Indians' immunity to violations of the Resource Conservation and Recovery Act); *Osage Tribal Council v. U.S. Dep't of Labor,* 187 F.3d 1174, 1182 (10th Cir.1999) (Tribes' sovereign immunity was abrogated to violations of the Safe Drinking Water Act). Because Section 101(27) of the Code makes no clear and specific reference to Indian tribes, unlike States and foreign governments, Congress has not unequivocally abrogated the tribes sovereign immunity under the Code. *Id.* Accordingly, the

court held that the Section 106(a) did not abrogate tribal sovereign immunity. *Id.*

Like *Kiowa* and *Greene,* the Nation moved the court to dismiss for lack of jurisdiction, relying on sovereign immunity. Like *In re Cattle,* Krystal argued Section 106(a) abrogates this defense. The Supreme Court has made it clear that sovereign immunity for Indian tribes must be abrogated by either (1) waiver by the tribe or (2) explicit congressional intent. *Kiowa,* 523 U.S. at 751, 118 S.Ct. 1700. There is no dispute that the Nation did not waive their sovereign immunity, nor any doubt the Nation is a federally recognized Indian tribe. All parties agree that Indian tribes have a degree of sovereign immunity from actions filed by non-member parties, and that Congress has the sole authority and power to limit the tribe's immunity at any time. The question is whether *Congress* waived the Nation's immunity pursuant to Section 106? The answer is no. Section 101(27) of the Code does not explicitly identify "Indian tribe(s)" as a "governmental unit."

The purpose of 1994 revised Section 106(a) of the Bankruptcy Code reflects Congress' clear intent to abrogate sovereign immunity of *States. Seminole,* 517 U.S. at 57, 116 S.Ct. 1114 (finding Congress did not have the authority to do so). Section 106(a) has been found to effectively abrogate the sovereign immunity of *foreign states. In re Tuli,* 172 F.3d 707, 711 (9th Cir.1999). (Iraq can no longer assert sovereign immunity under the new 1994 amendment to 106(a)). Congress in the past has *explicitly* restricted tribal immunity from suit in certain circumstances. *See, e.g.,* 25 U.S.C. § 450f(c)(3) (Self-Determination Contracts: mandatory liability insurance); 25 U.S.C. § 2710(d)(7)(A) (Tribal gaming ordinance); *See*

also, Florida Paraplegic, Association, Inc. v. Miccosukee Indian Tribe of Indians of Florida, 166 F.3d 1126, 1131 (11th Cir.1999) (because Congress made no specific reference to Tribes in the ADA, tribal immunity is not abrogated; suit was dismissed). Yet, on other occasions Congress has just altered to the tribes sovereign immunity. *See, e.g.,* 25 U.S.C. § 450n ("Nothing in this subchapter shall . . . (1) affect, diminish, or otherwise impair an Indian tribe's *sovereign immunity*"). Historically, Chief Justice Marshall articulated the legal bases for sovereignty of the Indian Tribes in three U.S. Supreme Court cases scholars referred to as the "Marshall trilogy." Peter Capossela, *Indian Reserved Water Rights in the Missouri Basin,* 6 Great Plains Nat. Resource J., Spring/Summer 2002, at 131. The cases were *Cherokee Nation v. State of Georgia*[3], *Johnson v. McIntosh*[4], and *Worcester v. State of Georgia*[5]. Chief Justice Marshal set the foundation that recognized Tribes as "distinct political entities that possessed the ability to negotiate with the United States and are free from state authority." *Id.*

C. Proper Service and Tax Determination

In view of the Court's decision with respect to sovereign immunity it is unnecessary to address the issues of service and determination of tax liability. As determined above, bankruptcy suits against Indian tribes are barred by sovereign immunity absent (1) waiver from the tribe or

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[3] 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (1831)

[4] 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823)

[5] 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832)

(2) explicit congressional intent to abrogate such defense. *Kiowa,* 523 U.S. at 751, 118 S.Ct. 1700. Based on the aforementioned reasons, neither has occurred here. Accordingly, because it was determined the Nation did not waive their immunity with regard to the U.S. bankruptcy laws, nor has the Code clearly abrogated their immunity, ruling on these issues are moot.

D. Indispensable Party

In determining whether a non-party is "indispensable," the district court must determine if absent party is "necessary" to action; then, if that party cannot be joined, the court must determine whether the party is "indispensable" so that in "equity and good conscience" the action should be dismissed. *Confederated Tribes of Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1499 (9th Cir.1991). The decision is determined by the facts and circumstances of each case. *Id.* Here, there are no facts other than claims by the Nation. This Court agrees with the prior judge's analysis that not enough information has been provided to decide whether the United States is an indispensable party to this proceeding. Accordingly, the issue as to indispensable party is waived.

IV. CONCLUSION

Considering the Supreme Court's pronouncements on tribal immunity, along with statutory language that does not unequivocally abrogate tribal immunity, inference to the contrary would be inappropriate. This is strengthened by the Supreme Court's instruction that the "unique trust relationship between the United States and Indian Nations," where Indian rights are at issue, "ambiguities in

federal laws must be resolved to the Indians' advantage." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). Although Section 106(a) holds that immunity is abrogated for "governmental units," the definition of "governmental units," pursuant to Section 101(27), does not clearly include Indian tribes.

V. DISTRICT COURT'S JUDGMENT

Accordingly, based upon the discussion above, the bankruptcy courts' Judgment dismissing Plaintiff's adversary complaint in favor of Defendant is AFFIRMED.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

Minute Entry

***Hearing Information*:**

Debtor: KRYSTAL ENERGY CO. INC.

Case Number: 2-01-00166-ECF-SSC **Chapter:** 11

Date/Time/Room: FRIDAY, SEPTEMBER 28, 2001
11:00 AM 10TH FLOOR #5

Bankruptcy Judge: SARAH SHARER CURLEY

Courtroom Clerk: WANDA GARBERICK

Reporter/ECR: ANDAMO PURVIS

***Matter*:**

ADV: 2-01-00171

KRYSTAL ENERTY CO., INC., vs THE NAVAJO NATION

DECISION ON RECORD RE: MOTION TO DISMISS COMPLAINT FILED BY DEFENDANT AND ORDER GRANTING THE MOTION

R/M #: 3 / 0

***Appearances*:**

THIS MATTER WAS NOT PREVIOUSLY SCHEDULED FOR A DECISION ON RECORD AND NO NOTICE WAS SENT TO PARTIES

***Proceedings*:**

THE COURT PLACED ITS DECISION ON RECORD. THE DECISION ON THE RECORD CONSTITUTES FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO

FED. R. CIV.P. 52 AS ADOPTED BY RULE 7052 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURES. THE COURT HAS JURISDICTION UNDER 28 U.S.C. SECTIONS 1334 AND 157 SOLELY TO RENDER A DECISION ON THE MOTION TO DISMISS. YOU MUST OBTAIN A COPY OF THE TRANSCRIPT TO HAVE THE COURTS DECISION; PLEASE CONTRACT WITH THE ELECTRONIC COURT RECORDER TO OBTAIN YOUR COPY OF THE TRANSCRIPT.

COURT: IT IS ORDERED THAT THE MOTION TO DISMISS BY THE NAVAJO NATION IS GRANTED. THE COURT NOTES IT IS GRANTING THE MOTION ON THE GROUNDS OF THE VALID CLAIM OF SOVERGN IMMUNITY OF NAVAJO NATION, AND ON THE FAILURE OF THE DEBTOR TO COMPLY WITH BANKRUPTCY RULE 7004(j).

/s/ Sarah Sharer Curley
HONORABLE SARAH
SHARER CURLEY
Chief United States
Bankruptcy Judge

COPIES OF THE FOREGOING MAILED OCT. 02, 2001 TO:

J. KENT MACKINLAY, 1019 S. STAPLEY DR., MESA, AZ 85204MACELINO R. GOMEZ, 411 N. CENTRAL AVE., #700, PHOENIX, AZ 85004

BY: /s/ S. Leary
DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:	)	
KRYSTAL ENERGY CO. INC	CH. 11)	
KRYSTAL ENERGY CO., INC vs THE NAVAJO NATION	)	01-00166-ECF-SSC
DECISION ON RECORD RE: MOTION TO DISMISS COMPLAINT FILED BY DEFENDANT AND ORDER GRANTING THE MOTION	)	ADV. 01-00171

U.S. Bankruptcy Court
2929 N. Central Ave., 9th Floor
Phoenix, AZ 85012

September 28, 2001
11:27 a.m.

BEFORE THE HONORABLE SARAH SHARER CURLEY, Judge

Proceedings recorded by electronic sound technician,

Andamo Purvis; transcript produced by A/V Tronics, Inc.

[2] THE COURT: The Court at this time is going to do its decision in the *Krystal Energy Corporation* case. And for purposes of the record, this decision specifically focuses on a hearing that was before this Court on May 23rd, 2001. It is an adversary No. 01-171, and it's the adversary which involves the debtor as the plaintiff and the Navajo Nation as the defendant.

This decision is a little bit different in the sense that the Navajo Nation only filed a limited or special

appearance to be heard just on its motion to dismiss the complaint, so as the Court goes forward and renders its decision, and notes that it has jurisdiction, it is only for the limited purpose of rendering a decision on the motion to dismiss.

The jurisdictional provision, just for this limited purpose, would be under 28 U.S.C. §§ 1334 and 157, and again, I am setting forth my findings of fact and conclusions of law under Bankruptcy Rule 7052.

The Court notes that the debtor filed this complaint. In the complaint the debtor alleges various claims for relief under 11 U.S.C., §§ 505 and 542.

We also know that in the underlying complaint the debtor focuses on several actions taken pre-petition by the Navajo Nation. First, the debtor notes that pre-petition about $691,000 in tax assessments were issued against the [3] debtor, and again this would be by the Navajo Nation. Apparently when the Navajo Nation was not paid, it subsequently seized substantially all of the debtor's assets, and once again, this seizure of assets also occurred pre-petition.

The Navajo Nation actually obtained several producing oil wells and related equipment. The seizure by the Navajo Nation pre-petition effectively resulted in putting the debtor out of business.

The Court also notes that at the oral argument on May 23rd the parties presented additional facts to the Court and possibly some additional argument concerning the issues presented.

At the oral argument the Court learned that the debtor had proceeded in the Navajo Nation Trial Court,

or Tribal Court, at least as to some of these tax issues. The parties agrees that the Navajo Nation had, for instance, gone forward and issued a notice of tax deficiency, and the parties described the procedure that once that notice was issued, there generally would be a hearing within 60 days.

Now that type of hearing in the Navajo Nation would be along the lines of an informal kind of conference-level hearing, or it would be a kind of hearing that we would normally think would happen at the administrative level.

Once there's a determination, though, at this [4] informal conference level, the debtor would have the right to proceed by way of appeal, and that appeal would actually go to a hearing officer. The debtor would have the opportunity for a full evidentiary hearing, and then once there was a decision or determination at that level, the debtor would potentially have a further right of appeal, potentially all the way up to the Supreme Court of the Navajo Nation.

We also know, as a result of oral argument on May 23rd, that the debtor in fact has started this process through the Navajo Nation to focus on the tax liability, the tax deficiency, and to try to determine what the appropriate amount is.

So of course the Court has some concerns about proceeding with any claim under 11 U.S.C. § 505, when the debtor has pursued another route or avenue. And at the time of the hearing, the oral argument, the Court, for instance, talked to the parties about a possible abstention argument, and that is, the Court focused on the fact that the Court, the Bankruptcy Court might

very well, might want to abstain from hearing these matters until, for instance, the Navajo Nation had gone through its particular process, and the debtor had had the right to exhaust its remedies on appeal.

So although the parties did not raise this issue of the abstention, the Court notes that that might be very well [5] be an additional basis for this Court to simply defer on the tax issues.

The debtor though at oral argument on Mary 23rd correctly raised the issue that there were some other claims that really were not in the tribal court's or the informal conference level dispute resolution process within the Navajo Nation. Specifically, the debtor noted that there were certain issues under 11 U.S.C. § 542 concerning the turnover of assets which were not a part of any litigation or action or proceeding within the Navajo Nation.

So even if this Court wanted to perhaps abstain concerning the § 505 issues, we still have a problem with the underlying issues that the debtor has brought before the Court concerning turnover.

The Court also learned the following additional facts at the May 23rd hearing. The Court learned that the Navajo Nation has not filed a proof of claim in this bankruptcy proceeding, and once again they have only made a limited or special appearance in this adversary just to be heard on the motion to dismiss.

The Navajo Nation does not consent to jurisdiction before the bankruptcy court. The Navajo Nation has not waived its sovereign immunity.

The Navajo Nation also advised this Court that the United States has not been made a party to these proceedings, [6] and the Navajo Nation felt that the United States must be added as an indispensable party based upon the fact that a department of the United States, specifically the Department of the Interior, had the exclusive authority to approve the oil and gas leases on the trust lands within the Navajo Nation, and that the Navajo Nation cannot unilaterally terminate that type of oil or gas lease.

I would not that at least in the debtor's complaint the debtor doesn't focus on the issue of termination. The debtor simply notes that there are several producing oil wells that the debtor have the ability to work with at the Navajo Nation, that those producing oil wells were seized by the Navajo Nation, and I guess the debtor also lost various related equipment that it was utilizing to produce oil.

The Navajo Nation seeks dismissal of the complaint on three specific grounds. The first is that the debtor's claims concerning turnover of property or determination of tax issues are barred by the doctrine of sovereign immunity.

The second claim or prong as set forth in the motion to dismiss is that the debtor's complaint should be dismissed for failure to comply with Bankruptcy Rule 7004(d), or Federal Rule of Civil Procedure 4(j)(2). So the Navajo Nation focuses on that as a basis to dismiss as well.

And finally we have the third prong as a part of the motion to dismiss, and that is the debtor's complaint [7]

should be dismissed for failure to join an indispensable party, specifically the United States.

Let's go to Point No. 1, the sovereign immunity issue. First of all we should take a look at the *Kiowa Tribe of Oklahoma* case. Specifically this is *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, and Kiowa is spelled K-I-O-W-A. The decision is at 523 U.S. 751, 118 Sup. Ct. 1700. It's a 1998 decision of the United States Supreme Court.

The supreme court focuses on several critical points. First of all, it says that as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. So the first concept that's brought out in this case, the first critical concept, is that there has to be some kind of specific congressional intent concerning a suit against the Indian tribe.

The *Kiowa Tribe* case also points out that Congress, subject to certain constitutional limitations, can alter or limit this kind of sovereign immunity as to the tribes, but it must be through explicit legislation. And I want to emphasize that, explicit legislation. So again, Congress may dispense with the concept. They may – or it may limit the concept of sovereign immunity, but whatever Congress does, it must be express. It must be set forth clearly in the [8] legislation.

The next case that I want to go to is *In re Greene* at 980 F.2d 599. This is a Ninth Circuit decision, and I think I have said 980 F.2d 599; it's actually 980 F.2nd 590. And the decision is *In re Greene*, G-R-E-E-N-E. It's a Ninth Circuit decision from 1992.

Now this case is important in the Court's analysis as well, but I want to focus on the fact that the *Kiowa Tribe* case is probably the most recent pronouncement about sovereign immunity, tribes, the fact that if it's going to be limited or waived, that it must be expressed in the legislation.

But even if we go back to an earlier time period, 1992, and take a look at *In re Greene*, we see that the Ninth Circuit specifically deals with the issue of 11 U.S.C. § 106, so it specifically deals with the bankruptcy code, albeit a prior version of the bankruptcy code.

As a part of its analysis, the Ninth Circuit takes a look at 11 U.S.C. § 101(24), which specifically defines a governmental unit. Now as a part of its analysis, the Ninth Circuit specifically states that it is assuming that tribes are governmental units for purposes of its analysis under § 106, but it also admits it is not deciding the issue, and that's important because I want to come back to that as a part of my decision today. But again, it says it's not [9] deciding the issue.

Even with its assumption that the Indian tribes would be governmental units, it then goes to § 106 and decides that § 106 still doesn't have the sovereign immunity being waived. And the Ninth Circuit takes a look at the various subdivisions and notes that the Indian tribe in the case that it was dealing with didn't file a proof of claim. So from the Ninth Circuit's standpoint, § 106(a) and (b) are both eliminated, because they deal solely with the issues of what happens when a governmental unit files a proof of claim.

The Ninth Circuit then goes to § 106(c), and that subsection specifically talks about the fact of what one

does if a governmental unit has not filed a claim. Then the Ninth Circuit goes through analysis of a case from another jurisdiction that's known as the *In re Sandmar Corp.*, case, and *Sandmar* is at S-A-N-D-M-A-R. And let me see if I have the citation for *Sandmar*. Yes, it's S-A-N-D-M-A-R Corp. It's at 12 B.R. 910, and it's a decision from the Bankruptcy Court, District of New Mexico, from 1981.

And the Ninth Circuit notes that *Sandmar* specifically felt that sovereign immunity should be waived because it was focusing on the fact that at least thee Bankruptcy Court in that case was dealing with assets of the bankruptcy estate, so it's somewhat similar to the case that I have because once again one of the claims that the debtor [10] is asserting is a turnover of assets of the bankruptcy estate.

But the Ninth Circuit, taking a look at *Sandmar*, decided that it was not correctly decided, and noted that even if there was a situation where assets were specifically within the exclusive jurisdiction of the bankruptcy court or the district court, taking a look at 28 U.S.C. §§ – or § 1334(d), that that was not dispositive of the issue of what types of defenses that could be raised to someone that was asserting a suit in the bankruptcy court or the district court which had exclusive jurisdiction over the assets. So that's an important point to consider in my analysis as well. The fact that we are dealing with bankruptcy assets doesn't, in and of itself, get rid of the claim of sovereign immunity. The tribe can always come in and assert that defense.

Then the Ninth Circuit also took a look at cases involving the Eleventh Amendment and the assertion of

the Eleventh Amendment by various states. The cases that the Ninth Circuit took a look at were pronouncements from the supreme court, and specifically, the Ninth Circuit took a look at *Hoffman*, H-O-F-F-M-A-N, which was a 1989 decision from the supreme court, and also *United States v. Nordic Village*, a 1992 decision from the supreme court.

Now the Ninth Circuit acknowledged that at least as to *Hoffman* that dealt with the Eleventh Amendment, and it [11] focused on the fact that at least as to the Eleventh Amendment that the party in the bankruptcy proceedings could not proceed under § 106(c), so it basically stated that § 106(c) was not sufficient to abrogate the claim of sovereign immunity under the Eleventh Amendment, at least as to states.

Nordic Village is a little bit different because once again it took a look at § 106(c), but noted that that particular subsection wasn't enough to waive sovereign immunity as to the United States. And then the Court went on to note that those types of cases could be used in its analysis as to the issues that the Ninth Circuit was facing in *In re Greene*.

Based then upon recent supreme court decision, as well as rejecting the analysis in *Sandmar*, the Ninth Circuit ultimately came to the conclusion that sovereign immunity had not been waived, that in fact the parties could not proceed in *In re Greene* with a suit under § 106(c).

Now in taking a look at *In re Greene*, I understand that one of the concerns of debtor's counsel was that simply *In re Greene* just took a look at the old version of

§ 106, and so debtor's counsel was concerned about the validity of *In re Greene* going forward.

Having said that, let me take a look at another case, and this is not a case from the Ninth Circuit. It is [12] from another jurisdiction, but it does take a look at § 106, the new version. This is the *In re National Cattle Congress* case at 247 B.R. 259. It's a decision from the Bankruptcy Court, Northern District of Iowa from 2000, and as a part of its decision the bankruptcy court in *Iowa* notes that § 106 has been changed. And it specifically notes that the new version is broader, and it talks about notwithstanding the assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit with respect to a number of provisions under the bankruptcy code.

And specifically the new § 106 focuses on the fact that sovereign immunity is waived as to § 505 of the code, and also § 542. And obviously those are the very sections that the debtor is utilizing in my case.

The Court in *National Cattle Congress* then goes on to take a look at the definition of governmental unit, and this is under § 101(27), and we go through an analysis of a governmental unit. Now what's important in taking a look at that definition is that it does not specifically include tribes. It doesn't say, "Indian tribes," "tribal governments," anything along those lines.

It does simply talk about a number of types of governmental units such as a foreign state. It talks about a state or commonwealth. It talks about a district or territory. And then there's the catch-all phrase, quote, "or [13] other foreign or domestic government," close quote. And then the *Iowa* court goes on to state that there are some

recent supreme court decisions that have once again focused on the issue of sovereign immunity.

Now the *Iowa* court specifically focuses on the supreme court decision of *Seminole Tribe v. Florida* at 517 U.S. 44, 116 Sup.Ct. 1114, which is a 1996 decision, and the *Iowa* court notes the following: It focuses on the fact that the supreme court has found that the language as set forth by me above concerning governmental units, that that particular language reflects Congress' clear intent to abrogate the sovereign immunity of states under the Eleventh Amendment.

But irrespective of that specific finding, the supreme court goes on to note that Congress, through the Article 1 provisions of the constitution, does not have the authority to act that way, so there's the express intent to abrogate sovereign immunity as to the states under the Eleventh Amendment, but there's the constitutional infirmity which prevents Congress from really enacting § 106, or at least allowing any party to utilize § 106 to proceed.

The *Iowa* court also goes on to note that sovereign immunity as set forth by me above as to foreign states has also been abrogated, and that is the *In re Tuli* decision at 172 F.3d 707, a Ninth Circuit 1999 decision. Now once again, *In re Tuli* took a look at the concept of sovereign immunity, [14] whether it's been abrogated, and § 106 of the code, and § 101 of the code, and specifically the definition of governmental unit.

And at least *In re Tuli* felt that foreign state had been sufficiently defined so that there was this express waiver by Congress, and based upon that, *Iraq* could not longer assert sovereign immunity under the bankruptcy code pursuant to § 106 as amended. So we know that in some

cases, based upon the new version of § 106, based upon the amendments or changes to § 106 after 1994, it has worked in some cases, and it has not worked in others.

We know that § 106 is now sufficient to get rid of a foreign state asserting sovereign immunity. We see that in *In re Tuli*. We see that in *Iraq* lost there, and their sovereign immunity was lost, and they were subject to the jurisdiction and the rulings and the judgments of the courts in *In re Tuli*.

But we also note that in some cases § 106 doesn't work, and that is although it was expressed as to the waiver of sovereign immunity as to states, it didn't work because the supreme court took a different view of it and felt that there were constitutional problems with § 106 as it pertained to states. Effectively, Congress did not have the authority under Article 1 to effect the sovereign immunity of the states under the Eleventh Amendment. So it did not work in [15] the *Seminole Tribe v. Florida* case.

So where does that put us in the current case law? Well, there's one other case that I want to focus on briefly, and this is just the Ninth Circuit position concerning sovereign immunity as to the states. This is the *In re Mitchell* decision. This is at 209 F.3d at 1111. This is a Ninth Circuit decision from 2000.

And in this Ninth Circuit decision, the Court states that Congress may abrogate state sovereign immunity in federal court if it is pursuant to a valid exercise of power. And once again, it goes back to the *In re Greene* decision, a different *Greene* decision, I might add, from the United States Supreme Court at 474 U.S. 64, and also it refers to *Seminole Tribe*.

Now the Ninth Circuit goes on to note that Congress had clearly expressed its intent to abrogate state sovereign immunity in § 106(a), and that goes back again to the ability of Congress to abrogate sovereign immunity. And the Ninth Circuit goes on to correctly note that of course the crucial issue is whether Congress had the authority to act when it revised § 106, and then the Ninth Circuit goes on to state that *Seminole Tribe* has subsequently come down and basically focused on the fact that Congress did not have the authority to abrogate state sovereign immunity under its Article 1 powers. Therefore, from a constitutional standpoint Congress [16] could not amend § 106 and affect the states. So *Mitchell* simply goes on to note the power of the *Seminole Tribe* case, and the fact that the Ninth Circuit felt that it must follow it in the *In re Mitchell* decision.

So from the Court's standpoint, I don't have any specific cases from the Ninth Circuit focusing on Indian tribes and § 106 as amended in 1994, but I can say that the United States Supreme Court decision of *Kiowa Tribe* from 1998 certainly lays the groundwork, certainly reaffirms the United States Supreme Court's ongoing concern about Indian tribes and sovereign immunity, and the ability of the Indian tribes to assert sovereign immunity.

So from the *Seminole Tribe* case we see that there is this initial indication that § 106, as amended, may not work in all situations. It certainly didn't work as to the state in that case simply because the supreme court felt that Congress had acted beyond its authority.

And I think we can carry over that reasoning and say that § 106 as amended does not apply to Indian tribes. Why is that? Because, again, *Kiowa Tribe* specifically

states that if there is going to be a waiver of sovereign immunity, it must be expressed as to the Indian tribes.

From the Court's standpoint, as I take a look at § 106 and § 101 of the bankruptcy code, there has to be something in either one of those provisions that focuses on [17] the waiver of sovereign immunity as to Indian tribes. Now it could be through an amendment to the definition of governmental unit, where we bring in Indian tribes and they are specifically defined as being a governmental unit. It could be as a part of § 106 itself where again Indian tribes are focused on, but from the Court's standpoint I do not have the express waiver that I need to have as outlined by *Kiowa Tribe*.

Because I don't have that explicit legislation, I would go back to the usual procedures as outlined in *Seminole Tribe*, as outlined in *Kiowa Tribe*, as outlined in *In re Greene*, and that is if we don't have an express waiver of sovereign immunity and the entity comes in and asserts it, that is going to be a valid claim, a valid defense.

Therefore, from the Court's standpoint the Navajo Nation's motion to dismiss is well-pled. Sovereign immunity has been asserted by the Navajo Nation; it has not been waived. The Navajo Nation has a right to rely on it. And again, that is based upon *Kiowa Tribe*.

The Court also notes that although not a decision from the Ninth Circuit, the *National Cattle Congress* case is a helpful case in taking a look at these issues, taking a look at § 101 and § 106, and focusing on the fact once again as I've analyzed it, that because the Indian tribes are not specifically mentioned in either one of those provisions, [18] sovereign immunity can still be asserted, and once a again governmental unit as defined is simply too broad to

bring in the Indian tribes and somehow say that there has been this express waiver of sovereign immunity as to the Indian tribes. So certainly the *National Cattle Congress* case is another helpful case, based upon my analysis today.

Now as I've stated, what I would do is simply grant the motion to dismiss based upon the fact that the Navajo Nation has correctly asserted its sovereign immunity, that that assertion bars the suit by the debtor for its claims as to turnover and as to a determination of tax liability. I could dismiss the complaint on that basis.

I would also note though that it seems that the Navajo Nation has also correctly asserted its concerns as to how the debtor served the complaint on the Navajo Nation. For that I specifically go to Bankruptcy Rule 7004(j), which again talks about service upon a foreign state or local government.

Now once again there is some concern about whether this provision of the bankruptcy rules also applies to the Navajo Nation, but at least it is helpful in an analysis and as we take a look at Bankruptcy Rule 7004(j), it notes that if you are going to serve as foreign state, a state, municipal corporation, et cetera, that one should look to the laws of that particular foreign state, or state, or subdivision, or [19] whatever, concerning service of process.

And as a part of the motion to dismiss, the Navajo Nation has set out its very definite procedures as to how is it to be served. The Court notes that in this particular case the debtor did not comply with those procedures, and because the debtor did not comply with those procedures, that's yet an additional basis to dismiss this complaint.

As to the specific procedures that must be complied with, those are set out at Pages 4 and 5 of the Navajo Nation's memorandum of law, and it specifically focuses on the fact that there is the Navajo Sovereign Immunity Act, which talks about the fact that there are only certain instances when the Navajo Nation consents to suit, and even when there is a consent to suit, specific parties must be served. Those parties would be the president and the attorney general of the Navajo Nation. And once again, that simply has not occurred here. That would be an additional basis for the Court to dismiss this complaint.

The Navajo Nation has also asserted a third predicate, and that would that the complaint should be dismissed based upon the fact that the debtor has failed to join the United States as an indispensable party. On that particular claim I need to defer. The difficulty is that the debtor has simply argued it is not concerned with the underlying lease agreements. Those are the particular [20] agreements that the Department of Interior must have control over.

The debtor, of course, asserts that it simply wants to keep the leases in place. It does want to go forward, though, and continue the production of oil from the various wells, and it wants to use its equipment. From the Court's standpoint, without actually taking a look at the lease agreements I can't decide, based upon this record, whether the United States would be an indispensable party.

Because I found two other bases to dismiss the complaint, though, I can simply note that I have insufficient information as to whether the United States is an indispensable party. I simply would not grant relief to the

Navajo Nation if that were the sole basis that it was proceeding, but because I have two other grounds to dismiss the complaint, I will utilize those instead.

Based upon the foregoing then, the debtor's complaint will be dismissed. The Court notes that the debtor is free to proceed with the litigation which is pending in the Navajo Nation concerning the tax issues, and the debtor may want to go forward and resolve these issues in an appropriate forum within the Navajo Nation, but this Court will not determine the issues.

I will go forward and execute a minute entry as the order of the Court.

[21] (Proceedings Concluded)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: October 9, 2001

/s/ Sally L. Cole
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